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IN THE

Supreme Court of the United States

October Term, 1946

UNITED STATES OF AMERICA,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, *et al.*,
Respondents.

Memorandum for Potomac Electric Power Company, Respondent, in Opposition to Petition for Certiorari

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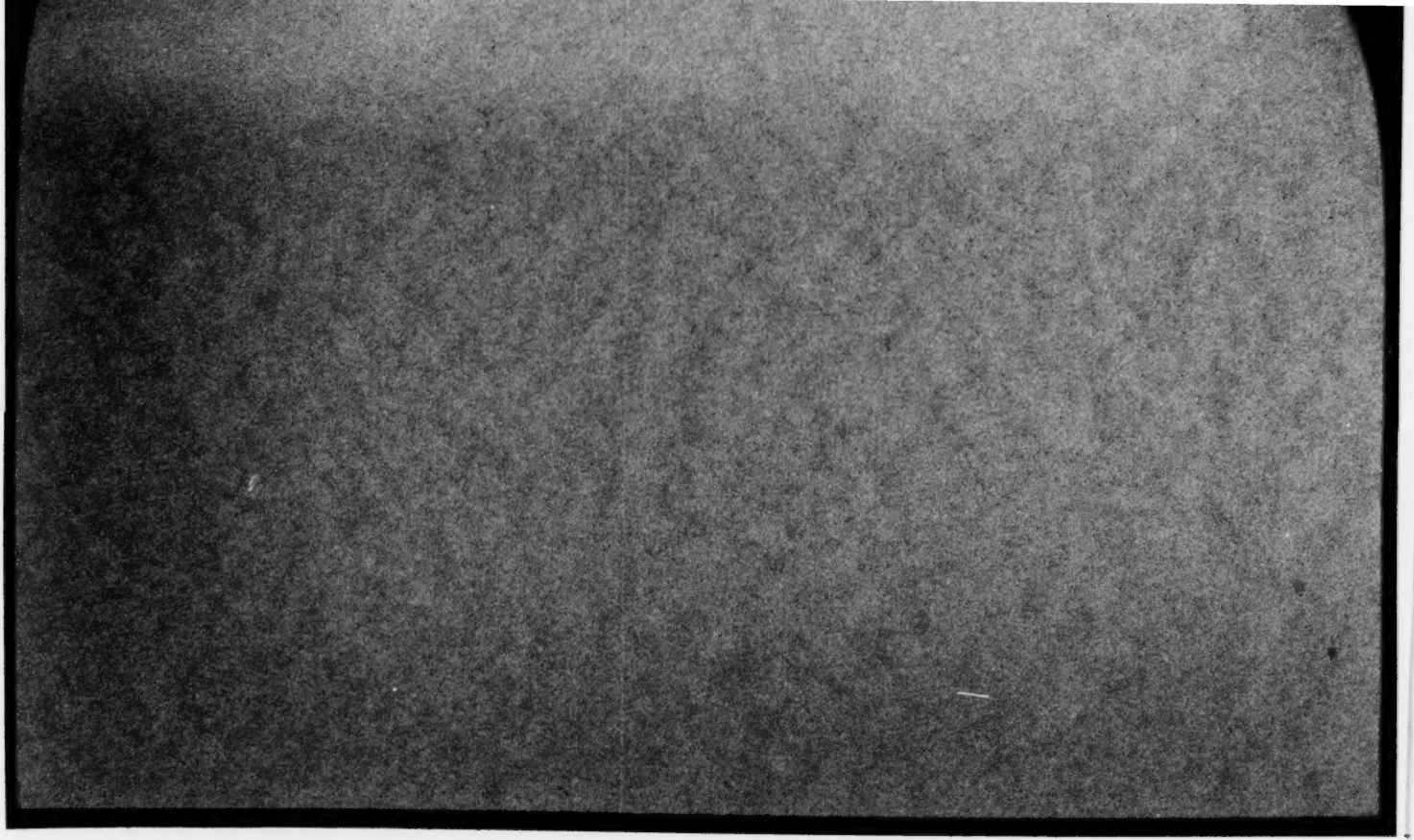
Dated April 14, 1947.



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Unlike the company's petition in No. 1038, which puts the question of power, the petition of the United States in No. 1135 is addressed to a matter of administrative discretion. Though both relate to the same order of the Commission, the company's would explore the boundaries of Commission power on a point of general interest, while the Government's would question the manner in which an assumed power should be exercised in this particular case.

The Commission undoubtedly gave great weight to the mathematical analysis stated in its opinion. But it took a broader view of its responsibilities. They were not merely to trace an equation on paper, but to balance the interests of consumer and investor so as to reach a practical result in the public interest. This was, of course, a factual inquiry. The nature and size of the company, the results of its operations and its prospects for the future were all pertinent. Low rates were desirable, but so also was the preservation of the company's ability to maintain and improve its service. Whatever the Commission's failure to follow statutory requirements urged by the company in No. 1038, clearly its final conclusion was a judgment act that purported to synthesize all these practical factors.

In broad perspective this step of the Commission may be viewed as an acceleration of its program, already enforced for many years, of progressive rate reductions, by which rates had been reduced substantially below the national average (R. 6; Petition, p. 6). The Commission acted, however, with realization of "the adverse effect of abrupt or violent changes in the return" (R. 31). The wisdom of one step at a time in the application of that policy is all the

clearer now when the whirlwind of ascendant costs is forcing so many public service companies, already exemplified by the rails and the communication companies, to seek large increases in their rates.

The Government's petition is not addressed to these functional elements, but looks wholly to technique, as if the manifold pragmatic adjustments of a rate order could be stated in a syllogism. Even at that level, however, it is clear that what the Government really attacks is the permitted return. But that is the product of the rate base and the rate of return. Any reduction in the rate base may be offset by a corresponding increase in the rate of return, for it is only their product that matters. Yet the rate of return is a point on which the Commission must be allowed a particularly wide area of discretion. It could not be said to have erred as a matter of law if it had in terms approved a rate of return high enough to permit more than the full amount of the actual earnings. In point of fact, the approval given by its annual rate orders contemplated and permitted the earnings actually realized, and none the less so because they happened to exceed the postulated norm toward which the orders successively approached. The actual earnings were, therefore, lawful earnings. So facilities acquired with them were, as the petition in that event admits (p. 16, n. 13), property on which, as much as any other, the company was entitled to earn a return (*Board of Public Utility Commissioners* v. *New York Telephone Co.*, 271 U.S. 23, 31, 1926).

The contrary could be urged only by asserting that all rates in the past were unlawfully high, though fixed by annual orders of the designated authority, each of which became final under the terms of local law. It may well be doubted whether such an assertion is of a sort to merit consideration by this Court. Not only does it collide with the legislative scheme for rate regulation, but further, it

undoes the work of government itself. And, for the future, it would undermine the administrative process by substituting for judgment a set of rules that could only "create an illusion of certainty where none exists" (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R.*, 318 U. S. 523, 565, 1943). The law on that point has been too recently proclaimed to need further exposition by this Court now (*Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 1944; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 1942).

So we submit that the Government's petition in No. 1135 should be denied. But were the Court to review those contentions on the method for the exercise of administrative discretion, then *a fortiori* the writ should be granted in No. 1038, which challenges the power on which any such discretion must rest.

Dated April 14, 1947.

Respectfully submitted,

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